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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 1237

M. L. CLIFTON ET AL.,

Petitioners,

VERSUS

E. C. SCHROEDER COMPANY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

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MAY, 1946.

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Petitioners pray that a writ of *certiorari* issue to review the judgment of the United States Circuit Court of Appeals for the Tenth Circuit, reversing and remanding the decision of the United States District Court for the Eastern District of Oklahoma.[1]

1. No. 1180, now pending in the Court on petition for certiorari and this case, No. —, were tried as parts of a single action in the District Court. The trial court's judgment in No. 1180 was also reversed, Judge Phillips dissenting.

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court (R. 72-78, 81-82) are not officially reported. The opinions of the Circuit Court of Appeals (R. 97) are reported at 153 Fed.(2d) 385.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 24, 1946 (R. 97).[2] The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Respondent was engaged in the reconstruction of segments of an interstate railroad and an interstate highway which were inundated as a result of the construction of a Federal dam project. The question is whether employees of respondent who supplied construction materials from a quarry opened specifically and solely for the reconstruction work were "engaged in commerce or in the production of goods for commerce" within the meaning of Section 7 of the Fair Labor Standards Act.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act are set forth in Appendix A.

2. On April 18, 1946, Mr. Justice Rutledge granted an extension of time to May 19 to petitioner to file this Petition for Certiorari. See Appendix B.

STATEMENT

Clifton, for himself and as agent for 45 other employees, brought this action under Section 16(b) of the Fair Labor Standards Act of 1938 to recover unpaid overtime compensation, an additional equal amount as liquidated damages, and attorneys' fees.

The facts, which were stipulated (R. 16-48), may be summarized as follows:

By Act of Congress, the United States Government authorized the construction of the Denison Dam and Reservoir on Red River between Texas and Oklahoma for flood control and other purposes (R. 16, 72). Pursuant to the Act, the United States Government let contracts for the relocation of approximately 18.71 miles of the branch and main lines of the St. Louis-San Francisco Railroad and approximately 3.8 miles of U. S. Highway No. 70, which would be inundated by the water impounded by the Denison Dam (R. 16-17, 45, 46, 72). The St. Louis-San Francisco Railway extends several hundred miles and crosses several states (R. 18, 45-46). U. S. Highway No. 70 crosses the United States from East to West (R. 18, 46). Both the railroad and the highway were, prior to the institution of the dam project, and have been at all times since, instrumentalities of interstate commerce (R. 18, 72).

The portions of the railway and highway inundated by the large body of water formed by the dam had to be replaced or rebuilt. The relocated portions took the place of those sections of track and highway inundated and were joined to

and made a permanent part of the existing instrumentalities of interstate commerce over which the free flow of commerce had been temporarily halted by the inundation (R. 18-19, 72-73). At the present time, the relocated portion of the railroad track is being used by the railway company as part of its interstate transportation system (R. 19); and the relocated portion of the highway, though not completed at the time of trial, is now presumably being used as an instrumentality of commerce (R. 19, 73). During the period of construction, of course, no traffic moved over the relocated portions of the railroad and highway (R. 46-47, 73). Railroad traffic during this period continued to pass over the part of the railroad that was in existence before relocation occurred. Highway traffic continued over the existing highway until it was inundated; it was then detoured over other roads (R. 46-47, 73).

All the work performed under the contracts was a part of the Denison Dam and Reservoir project (R. 18). The contractors agreed to furnish the material and perform the construction work for the relocation of the railroad and highway (R. 16-17). It was necessary to survey, clear, grade, fill, and excavate the sites, drive piling and construct necessary concrete superstructures and bridges (R. 72). The contractors acquired leases of property from which approved rock could be produced and manufactured (R. 73). A quarry was opened and operated for the specific purpose of producing gravel and rock with the particular formation required for the projects (R. 74). The prime contractors entered into

contracts with respondent to perform a part of their work under the Government contracts (R. 16-17, 73). Petitioners were mechanics, laborers and power shovel operators employed at the quarry, whose work consisted of mining, processing and producing stone used for gravel cushion and riprap for the approaches to the bridges on the railroad track and highway (R. 16-17, 73-74).

The District Court held (1) that in quarrying rock for use upon the interstate transportation lines petitioners were engaged in the production of goods for commerce because the rock mined or processed was necessary for the continued movement of interstate commerce (R. 74); and (2) that the building of the relocated portions of the highway was in the nature of replacement or rebuilding those portions of the transportation lines inundated so that the transportation systems might continue to be used for interstate commerce but that petitioners' work was not so closely related to commerce as to be "in commerce" (R. 75).

On appeal, the Circuit Court of Appeals, with each judge writing a separate opinion and with Judge Huxman dissenting, reversed and remanded the case on the grounds (1) that petitioners were not engaged in the production of goods for commerce, and (2) that petitioners' activities were not so closely related to commerce as to be "in commerce." Judge Bratton, writing for majority, was of the opinion that petitioners were not engaged in the production of goods for commerce because their work did not relate to goods which were shipped "in commerce," and that they were not engaged

in commerce because they worked off the road. In a separate opinion Judge Phillips agreed that the employees were not engaged in production for commerce but for the reason that the rock "was not produced to supply the needs of interstate commerce, to serve as an essential part of such commerce, nor to aid or facilitate the carrying on of such commerce by essential instrumentalities or facilities of commerce" because it "was produced in order to construct new segments of railroad and highway that had not yet become instrumentalities in such commerce." He was of the opinion that their work was not in commerce because it related to "new construction." Judge Huxman dissented and was of the opinion that the judgment of the trial court should be affirmed.

REASONS FOR GRANTING THE WRIT

1. The Circuit Court's decision that petitioners were not engaged in commerce involves an interpretation of the Act which is inconsistent with this Court's decisions in *Overstreet* v. *North Shore Corp.*, 318 U.S. 125, and *Pedersen* v. *J. F. Fitzgerald Const. Co.*, 318 U.S. 740. The furnishing of the materials for and performance of the work of relocating and rebuilding the segments of the instrumentalities of commerce which were inundated was a single integrated project. The work of the employees who produced the materials in quarries opened and operated for the special purpose of rebuilding the interstate facilities was vital to their proper functioning as instrumentalities of interstate commerce. The *Overstreet case,* 318 U.S. 125, involved an employee who

raised and lowered a drawbridge, an employee who repaired the drawbridge, and an employee who collected tolls. These activities were considered "vital to the proper functioning of these structures as instrumentalities of interstate" (Page 130). The employees' work "in providing a means of interstate transportation" was held to be "so intimately related to interstate commerce" as to be a part of it (Page 130).

In the *Fitzgerald Co. case*, 318 U.S. 740, employees who built new abutments under two bridges and repaired the substructure of two other bridges were held engaged "in commerce" on the authority of the *Overstreet case*. The decisions in the *Overstreet* and *Fitzgerald cases* should be controlling here because the employees' activities were an essential part of "work upon the transportation facilities" (*McLeod* v. *Threlkeld*, 319 U.S. 491 at 494), and were vital to the functioning of the highway and railroad as instrumentalities of commerce.

The view of Judge Phillips that the work was not in commerce because the segments were "new" and had not yet been connected with the existing instrumentalities at the time the work was performed is inconsistent with this Court's holding in the *Fitzgerald case*. The abutments involved in the *Fitzgerald case* were "new"[3] in the same sense that the

3. In Walling v. Patton-Tully Transp. Co., 134 Fed. (2d) 945, the Sixth Circuit held "in commerce" the new construction, as well as the repair, of dikes and revetments on the Mississippi River, the purpose of which was "to direct and channelize the current of the river in order to prevent erosion and to maintain the minimum depth required by commercial navigation."

segments of highways in the instant case were "new," and were unconnected with the railroad while the employees were building them [288 N.Y. 687, 43 N.E.(2d) 83]. Similarly, it seems inconsistent with this Court's holding in *Pedersen* v. *Delaware, Lack. & West. R. R.*, 229 U.S. 146, to give weight to the fact that the employees' work was off the road, and to rely upon the *Threlkeld case* here, as Judge Bratton's opinion appears to do. The employee involved in the *Threlkeld case* was serving the personal needs of railway repair men. More closely in point is the *Pedersen case* in which an iron worker was held to be engaged in interstate commerce within the meaning of the Employers' Liability Act while carrying bolts to be used in replacing a girder of a railroad bridge. It was argued that the employee was not engaged in commerce at the time because he was not working on the instrumentality "but was merely carrying to a place where that work was to be done some of the materials to be used therein" (Page 153). The Court rejected the argument as having "no merit" because "it was necessary to the repair of the bridge that the materials be at hand, and the act of taking them there was a part of that work" (Page 152). In the instant case also it was necessary "that the materials be at hand" and the work of making them available was part of and vital to the maintenance of the highway and railroad as instrumentalities of interstate commerce.

2. The decision of the court below, that employees were not engaged in the production of goods for commerce because their work did not relate to goods which would even-

tually move in commerce, is in conflict with the decisions of other Circuit Courts of Appeals. *Fleming* v. *Atlantic Co.*, (C.C.A. 5), 131 Fed.(2d) 518; *Chapman* v. *Home Ice Co.*, 136 Fed.(2d) 353, *certiorari* denied, 320 U.S. 761; and *Southern United Ice Co.* v. *Hendrix*, (C.C.A. 6), 153 Fed.(2d) 689. These decisions held that employees who produce goods which are essential to the carrying on of interstate commerce and transportation are engaged in "production for commerce" under the Act. "Commerce," it is pointed out, by the express definition of Section 3(b) means "commerce" or "transportation" and "for" means "as a preparation toward or in view of having as goal or object; * * * to serve as part of; to supply the need of; in order to effect." *Fleming* v. *Atlantic Co.*, (C.C.A. 5), 40 Fed. Supp. 654, 661, affirmed 131 Fed.(2d) 518. When, as the District Court found in the case at bar, "the rock mined or processed was necessary for the continued movement of interstate commerce" (R. 74), it follows that the rock was produced for commerce. On this ground the Fifth Circuit Court of Appeals held in *Fleming* v. *Atlantic Co.*, 131 Fed.(2d) 518, that the production of ice for use in icing interstate freight cars and trucks was "production of goods for commerce." The Fifth Circuit accepted and approved the trial court's determination that "the ice produced for such icing and refrigeration is produced 'in view of, or to serve as an essential part of, interstate transportation or commerce'." In *Chapman* v. *Home Ice Co.*, 136 Fed.(2d) 353, *certiorari* denied, 320 U.S. 761, the Sixth Circuit Court of Appeals held the manufacture and delivery

of ice to railroads for their refrigeration cars was "production for commerce" because of the "close and substantial relationship of the production * * * to interstate transportation." In *Southern United Ice Co.* v. *Hendrix*, (C.C.A. 6), 153 Fed.(2d) 689, the Sixth Circuit again held that employees engaged "in the production, transportation or delivery of ice intended for servicing interstate facilities" are engaged in production for commerce. See also, *Hamlet Ice Co.* v. *Fleming*, (C.C.A. 4), 127 Fed.(2d) 165, and *Hansen* v. *Salinas Valley Ice Co.*, (App. Calif.), 144 Pac.(2d) 696.[4]

Furnishing rock so that an instrumentality of commerce may continue to function as such is production of goods for commerce in the same manner as furnishing ice so that a carrier may function effectively.

3. "Commerce" in the Constitutional sense embraces not only the movement of goods in commerce but carriers engaged in interstate commerce and instrumentalities by which such commerce is carried on. *Interstate Commerce Commission* v. *Illinois Central Railroad Co.*, 215 U.S. 452. By including the word "commerce" within the definition of

4 Subsequent to the Fifth Circuit's decision in Fleming v. Atlantic Co., supra, the Sixth Circuit's decision in Chapman v. Home Ice Co., supra, and the Fourth Circuit's decision in Hamlet Ice Co. v. Fleming, supra, the Administrator of the Wage and Hour Division issued a release (A-14, March 13, 1945) in which he stated: "In the light of these decisions it is my opinion that the Fair Labor Standards Act in its application to employees engaged in the production of goods for interstate commerce, is not limited to employees engaged in the production of goods for shipment across state lines. The courts have indicated that goods are produced 'for commerce' even though they do not subsequently leave the state, if they are produced in order to supply the needs of interstate commerce, or to serve as an essential part of such commerce, or to aid or facilitate the carrying on of such commerce by essential instrumentalities or facilities of commerce such as interestate railroads, highways, telegraph or telephone systems, pipe lines, airports, harbors, and the like."

"commerce" in the Fair Labor Standards Act the Congress intended to embrace more than trade, transportation, transmission, etc. It evidently intended to include the instrumentalities by which commerce is carried on so that the furnishing of rock for such an instrumentality so that the movement of commerce thereon could be continued and such instrumentalities of commerce continue to function as such, is production of goods for commerce.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Circuit Court of Appeals of the Tenth Circuit erred in reversing the judgment of the District Court in favor of petitioners and that this petition for writ of *certiorari* should be granted.

THOS. W. CHAMPION,
LOUIS A. FISCHL,
Ardmore, Oklahoma,
Counsel for Petitioners.

MAY, 1946.

APPENDIX A

Fair Labor Standards Act, Ch. 676, 52 Stat. 1060

(29 U.S.C., Sec. 201 *et seq.*)

"Sec. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

* * * * * *

"Sec. 3. As used in this Act— * * * (b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof. * * * (i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof. (j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

* * * * * *

"Sec. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce— * * * (3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

APPENDIX B

SUPREME COURT OF THE UNITED STATES

No. —, October Term, 1945

M. L. CLIFTON, ETC., ET AL.,
Petitioners,
VERSUS
THE E. C. SCHROEDER COMPANY, INC.,
a Corporation.

Order Extending Time Within Which to File Petition for Certiorari

Upon consideration of the application of counsel for the petitioners,

It is ordered that the time for filing a petition for certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 19th, 1946.

(*Signed*)
WILEY RUTLEDGE,
Associate Justice of the
Supreme Court of the United States

Dated this 18th
day of April, 1946.

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No. 1237

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CLERK

Supreme Court of the United States

OCTOBER TERM, 1945

M. L. CLIFTON, for Himself and as Agent for E. M. AVERY, ET AL., *Petitioners,*

v.

THE E. C. SCHROEDER COMPANY, INCORPORATED, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR RESPONDENT

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Supreme Court of the United States

OCTOBER TERM, 1945

No. 1237

M. L. CLIFTON, for Himself and as Agent for E. M. AVERY, ET AL., *Petitioners,*

v.

THE E. C. SCHROEDER COMPANY, INCORPORATED, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR RESPONDENT

This case originated in the District Court of the United States for the Eastern District of Oklahoma as a suit to recover overtime allegedly due under the Fair Labor Standards Act on behalf of a number of employees engaged in various aspects of the work of the respondent. In the District Court the decision was in favor of the employees on certain of the issues and in favor of the Company on others, depending upon the nature of the employment. An appeal and a cross-appeal resulted in decisions by the court below in which both aspects of the decision of the trial court were reversed. Respondent here has already petitioned for a writ of certiorari from that portion of the Circuit Court of Appeals decision unfavorable to it (*E. C. Schroeder Com-*

pany, Inc. v. *Clifton, et al.*, No. 1180, October Term, 1945). The present petition brings before the Court the other aspects of the case upon which respondent here prevailed in the Circuit Court of Appeals.

We believe that the court below was correct in holding, as it did on this branch of the case, that workmen engaged in producing or quarrying gravel and rock which are delivered at the quarry and used locally by others for construction, reconstruction or relocation of a railroad track and a highway road bed are not "engaged in the production of goods for commerce" within the meaning of the Fair Labor Standards Act. Such was the consistent administrative construction of the Act from its enactment until March, 1945, when the Administrator specifically overruled his prior interpretations. No decisions sanction interpreting the word "commerce" as meaning "instrumentalities or facilities" of commerce, nor do any of the decisions of this Court or indeed of the lower courts sanction the extension of the Act urged by the petition in this case. There is a plain and obvious distinction between cases in which materials are produced locally but are carried by instrumentalities of commerce across state lines (such as the "ice" cases, petition pp. 8-10), and this case where the materials are not only produced locally but are placed in road beds within the state where they remain permanently. There is also an obvious distinction between workmen who are engaged in repairing bridges, railroad tracks or the like (petition pp. 6-8), and the present petitioners who were engaged only in quarrying the crushed stone and gravel, and had no part whatever to do with the subsequent building or repairing of the railroad, road bed or highway.

Respondent realizes, however, that the question involved is one of general significance. Moreover, it is part of a single controversy between respondent and its employees, the other part of which we earnestly urge the Court to

review in accordance with our petition already filed. In the event that our petition is granted, we do not feel warranted in urging the Court to reject the other branch of the case represented by the present petition.

For these reasons we do not oppose the granting of certiorari in this case if certiorari is also to be granted in No. 1180, *supra,* even though it is our firm belief that the decision below on this branch of the case is correct and will be affirmed.

Respectfully submitted,

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May, 1946